TASK FORCE

ON

AGRICULTURAL LABOUR RELATIONS

REPORT

TO THE

MINISTER OF LABOUR

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June 1992

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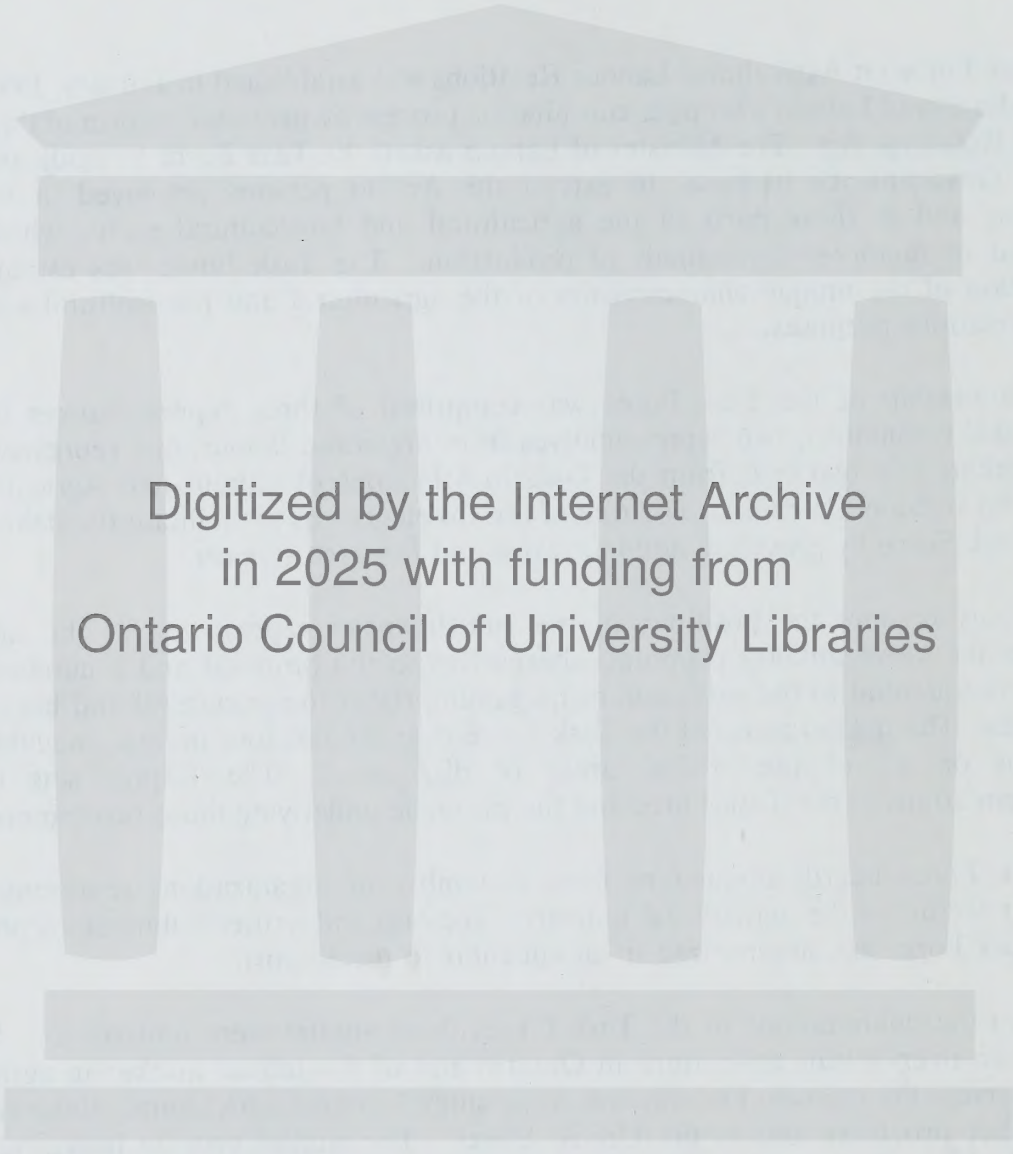
The Task Force on Agricultural Labour Relations was established in January, 1992 as part of the Ministry of Labour's broader consultation process on proposed reform of the Ontario Labour Relations Act. The Minister of Labour asked the Task Force to study and report on the Government's proposal to extend the Act to persons employed in landscape gardening and in those parts of the agricultural and horticultural sector which utilize industrial or factory-style methods of production. The Task Force was established in recognition of the unique characteristics of the agricultural and horticultural sectors for labour relations purposes.

The membership of the Task Force was comprised of three representatives from the agricultural community, two representatives from organized labour, one representative of farm workers and two staff from the Ontario Ministries of Labour and Agriculture and Food, who acted as Co-chairs. The role of the Co-chairs was to facilitate the deliberations of the Task Force by providing administrative and research support.

The Report reviews the positions of the constituencies represented at the table and examines the Government's proposal, alternatives to the proposal and a number of key issues consequential to the extension of bargaining rights to agricultural and horticultural employees. The deliberations of the Task Force over the last four months concluded with consensus on all of the critical areas of discussion. The Report sets out the recommendations of the Task Force and the rationale underlying those recommendations.

The Task Force heard submissions from a number of organizations representative of particular sectors of the agricultural industry. The oral and written submissions presented to the Task Force are summarized in an appendix to the Report.

To inform the deliberations of the Task Force, three studies were undertaken. Study 1 provides an overview of agriculture in Ontario and of the labour market in agriculture. Study 2 surveys the relevant Ontario law, while study 3 surveys agricultural labour relations in the other provinces and in the United States. The studies provide background and context, but they do not necessarily reflect the views of the members of the Task Force. The studies are available upon request.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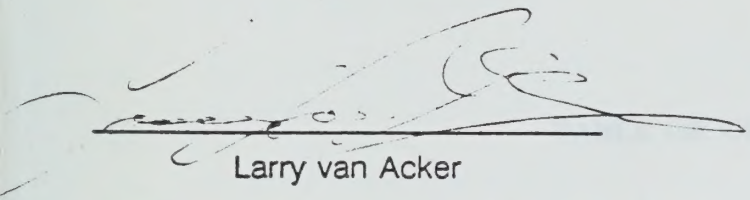
All of which is respectfully submitted,
The Task Force on Agricultural Labour Relations



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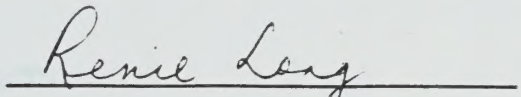

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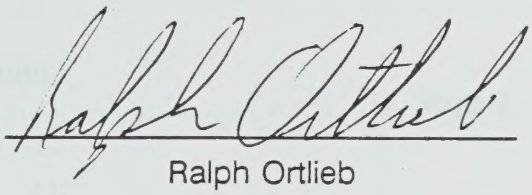

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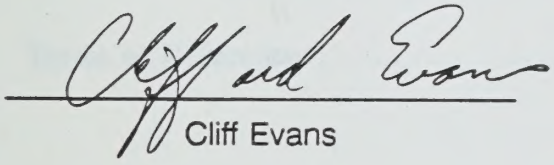

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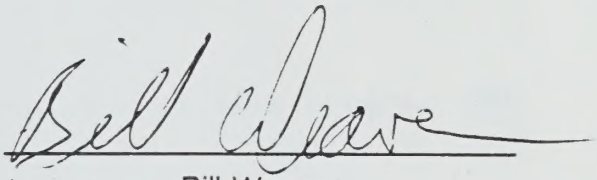

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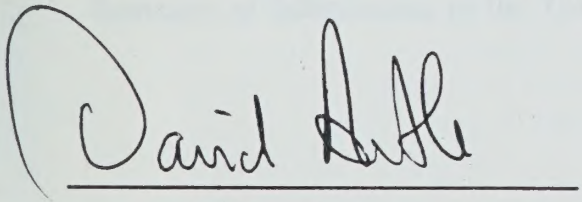
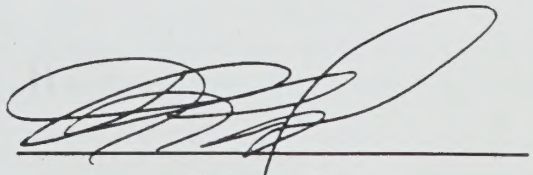


David Antle
Co-chair



Richard Prial
Co-chair

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Recommendations of the Task Force on Agricultural Labour Relations

In light of the government's commitment to extend to persons employed in agriculture and horticulture the right to organize and bargain collectively, the Task Force recommends:

1. the creation of a separate statute for the agricultural sector, the Agricultural Labour Relations Act;

2. the extension of the right to organize and bargain collectively to persons employed in agriculture and horticulture;

3. the prohibition of the right to strike or lock-out and substitution of a dispute resolution process that;

    . emphasizes the preference for negotiated settlements between the parties,

    . provides a conciliation and mediation service to assist the parties in reaching a negotiated settlement,

    . provides an arbitration process for the final and binding resolution of all outstanding matters between the parties following exhaustion of the negotiation process,

4. the creation of conciliation, mediation and adjudicative services, with expertise, for the purpose of administering the Agricultural Labour Relations Act and assisting the parties in matters relating to labour relations;

5. the establishment of educational programs, through existing agricultural organizations, to ensure that participants become and remain informed in matters of labour relations;

6. the continuation of a Task Force with a mandate to advise on the design of an agricultural labour relations statute and accompanying administrative structure as well as supportive educational programs for participants to the process by September 30, 1992. If there are matters that have not been resolved, discussions on the outstanding issues can continue provided that there is unanimous consensus of the Task Force members and the approval of the Government.

TOWARDS A NEW MODEL OF AGRICULTURAL LABOUR RELATIONS: ISSUES AND ALTERNATIVES

A. Models of Collective Bargaining in the Agricultural Sector

(a) Retention of the present exclusion

Most of the thirty-five, submissions made before the Task Force, take the initial position that the Labour Relations Act ought not to apply to employees in agriculture and horticulture. As a review of Appendix C to this Report will suggest, the arguments advanced in support of this position fall into four main classes.

Although the agricultural community supports the right of agricultural employees to organize, its greatest concern is that the extension of the Labour Relations Act to agricultural employees would subject farms to the risk of a work stoppage to enforce contract demands. In its view, that would be catastrophic for agriculture. The continuing economic viability of any agricultural enterprise depends on an uninterrupted harvest and post-harvest process or on maintaining continuous processes. Resort to a work stoppage as an economic lever, even for the briefest of periods, may prove fatal to the typical farm enterprise, for the work stoppage threatens the living organisms that must be continuously tended or the crops that must be harvested within a very brief period of time, sometimes within hours of maturity. The agricultural community is acutely sensitive to the issue of animal welfare and, as such, is very concerned that economic action in the form of a work stoppage could endanger the livestock the care of which the farmer is entrusted.

The second, closely allied argument proceeds from economic interest, and has two interrelated aspects. It is suggested that the mere right to strike, even if there is no actual resort to it, will have a significant impact on farm economics, largely because it raises the degree of risk associated with farming. The effects of the heightened risk factor will be reflected in higher interest and insurance costs, higher prices and possibly lower farm gate receipts as processors and ultimate consumers pursue other avenues of supply that appear less expensive and more secure.

The agricultural community also argues that, to the extent that an organized workforce will tend to raise labour costs--a very significant component of input costs--those costs will have to be passed on since farm incomes are generally too depressed to absorb them. In respect of those commodity groups subject to Ontario's supply management system, there is likely to be a lag between a rise in input costs and the corresponding increase in price. However, even within these groups there can be little control over the ultimate price. Moreover, the combined effects of increasingly global competition in agricultural commodities and depressed world-wide commodity prices severely constrain the ability of Ontario farmers to pass on higher input prices. Thus, at least in the short term, higher input costs will tend to be reflected in lower farm incomes.

A third argument advanced in support of retaining the present exclusion of agricultural and horticultural workers is based on the perception that farm operations have little or nothing in common with the sorts of industrial enterprises whose labour relations have been traditionally regulated by statutes such as the Labour Relations Act. It is argued that to draw the agricultural sector into the present industrial relations system would have the effect of drawing the farm sector into a hostile environment insensitive to the special concerns and characteristics of agriculture. Attention is drawn in particular to characteristics such as the perishable nature of product, the seasonal nature of the workforce, the narrow window of opportunity for harvest and the need for a workplace governed by the dictates of the product and the weather rather than inflexible rules of work.

Finally, a number of farm owners have expressed a series of concerns associated with the effect of union organization on the present state of employer-employee relations. Some farmers are concerned that extension of the Act to their employees will have the effect of inserting a third party, the union, into what is a close personal relationship, and will thereby drive a wedge between farmer and worker. From the perspective of many smaller farmers, there is a concern that there will be inequality of bargaining power between the typical farmer and the large union. However, it must be emphasised that the agricultural community as a whole recognizes the importance of organization in the farm sector, and is not opposed to the self-organization of farm workers.

A good many of these arguments were heard in British Columbia before the government decided to remove the agricultural exclusion from the British Columbia statute in 1975. The arguments were made before the British Columbia Standing Committee on Labour and Justice, which held in 1974 province-wide hearings on the question of bringing farm and domestic workers under labour standards legislation. In recommending that the benefits of labour legislation in general be extended to farm workers, the Committee set out a number of countervailing considerations that may be noted as a starting point for developing the argument in favour of extending the reach of the Labour Relations Act.

The B.C. Committee wrote that the benefits of higher labour standards include increased employee satisfaction, higher productivity and increased labour force stability. Higher wages and improved working conditions, the Committee said, are likely to help resolve the acute shortage of farm labour often noted by farm operators. Higher labour costs may also encourage greater mechanization in an effort to raise unit efficiencies. The Committee went on to note that the higher costs of labour and increased mechanization will compel use of better skilled labour, which may in turn generate greater efficiencies and higher incomes overall. Finally, the Committee concluded that higher food prices are justifiable to ensure an appropriate living standard for agricultural employees.

Organized labour in Ontario similarly takes the position that an organized workforce will improve productivity and competitiveness. This view is supported by a body of academic literature holding that, although the short-term effect of an organized workforce is to raise costs, an organized workforce is likely, in the longer term, to be more stable, productive and efficient. It is necessary to point out that the view that a unionized work force leads to higher costs overall has also attracted considerable support. Although this debate is not properly the subject of this Report, reference to it serves to place the arguments over the economic effects of organization in a broader context.

From the labour perspective, another compelling argument against the present exclusion of farm workers is the absence of a convincing social justification for depriving farm workers of a right enjoyed by most other occupational groups. Only one other agricultural jurisdiction in Canada, Alberta, denies farm workers access to collective bargaining. The mere availability of the right has not, for a host of reasons, resulted in organizing on a significant scale nor has it had a significant negative impact on farm economics. It nonetheless remains an important right to which farm employees ought to have access.

The single most critical issue, from the point of view of the Ontario farm community, is the threat of work stoppage. Organized labour has argued, however, that the overwhelming importance to both farm employers and employees of ensuring prompt harvest and maintaining continuous processes offers the single greatest disincentive to resort to the work stoppage. Given that the interests of both employer and employee coincide in this respect, it is suggested, the likelihood of a work stoppage in the primary agricultural sector is minimal. The assumption underlying this view is that the parties to a collective agreement negotiation in the agricultural sector are responsible and mindful of their interdependence and the necessity of ensuring that product gets to market.

Organized labour has also argued that farming has changed since the Labour Relations Act became law in 1946. Increased mechanisation, increased size of facility to take advantage of economies of scale and the rise of "agribusiness" are but the most obviously novel features of the contemporary picture of agriculture. In the view of labour, the role of the worker and the nature of the employer-employee relationship have changed in step with these developments. The changes in certain sectors of agriculture, it is suggested, have been so profound that workers employed in those sectors need access to the protections provided by the Labour Relations Act.

(b) Limited Extension of Bargaining Rights

(i) The "Industrial or Factory-Style Farm"

The Government's preferred option favours a limited extension of the Act to certain sectors of agriculture. The option is based on the proposition that there is no justification for denying employees working in factory-style agricultural operations the same right to organize and bargain that is available to similarly situated employees in the industrial sector. The option also recognizes that different considerations come into play in respect of the entity called the "family farm".

As the discussion of the history of the notion of industrial farm in Study 2 suggests, the term attaches to a type of agricultural operation that appears in the nature of its work organization and its employer-employee structure to have more in common with a readily recognizable "industrial" facility than with a smaller-scale operation that relies mainly upon the labour of a family, supplemented by seasonal or part-time help. Hence the distinction between family farm and the larger, factory-like operation.

The Ontario Labour Relations Board, in dealing with cases involving attempts to certify unions of employees of large mushroom and chick hatchery facilities, noted that these operations were not easily distinguishable from the type of industrial operation presently covered by the Labour Relations Act.[1] Although the Board conceded that it would make sense to extend collective rights to the employees of this kind of facility, it nonetheless found these facilities to be agricultural rather than industrial and denied the certification applications.

The discussion paper option is based on the analysis pursued by the Labour Relations Board. From this perspective, the factory-style farm is unlike the family farm in that the former, to take advantage of economies of scale, employs significant numbers of people. Yet another distinguishing feature of the "industrial or factory style" of operation is its cycle of production, which may be continuous and repeated a certain number of times each year. The cycle is not directly affected by climate and seasonal variation since the operation is indoors. Consequently, the labour force in such a facility may tend to be stable and not as much subject to seasonal variation as the labour force engaged in field crop or fruit and vegetable production. This conclusion would tend to be borne out by comparing the composition (year round vs. seasonal) of the workforce in these two commodity groups to the workforce in other commodity groups, on the basis of Table 5 set out in Study 1.

By contrast, according to this approach, the family farm is an operation of an indefinably small scale. Unlike the industrial-type facility, the family farm is not an entity with a relatively substantial work force that is organized in accordance with recognized workplace human resources and production practices. Moreover, the family farm is commonly subject to seasonal variation in production cycles and employment patterns. From this perspective, the regulation of labour relations in the unique environment presented by the family farm seems neither necessary nor desirable.

Organized labour has taken a position in support of the government's preferred option. In its submission to the Minister of Labour, which was tabled for the consideration of the Task Force, the United Food and Commercial Workers Union takes the position that the reach of the Act should extend to persons employed in agricultural and horticultural operations that use a "technological or industrial method of production". Examples of such operations given are landscape gardens, hatcheries, mushroom farms, dairy farms and fish farms. These types of operations are distinguished from family farms, generally defined as farms employing fewer than six family members. The UFCW's preferred model for extending the Labour Relations Act to farm workers is, in summary, based on a categorization of the nature of a farm operation subject to a certain minimum size.

Submissions from the agricultural community strongly reject the distinction between "family farm" and "industrial or factory-style farm" as arbitrary and impracticable. The basis for this view is that all farms use technological processes, and are required to do so in order to remain competitive, but are not for that reason alone industrial or factory farms. Even though such farms can be operations of considerable scale, they nonetheless remain family farms. In short, it is said, the distinction is based on a misunderstanding of the modern farm. The term "industrial or factory-style farm" is, from the perspective of the agricultural community, at best misleading and certainly inadequate as the basis for extending collective

bargaining rights to the employees of some farms but not to others. At the same time, merely because a farm falls into a particular class of agricultural production, such as mushrooms or chick hatching, does not justify describing all farms in such sectors as industrial farms. In the view of the agricultural community, chick hatcheries and mushroom farms are commonly small, family-run facilities that have little in common with the type of facility that attracts the description of industrial or factory operation. Any resemblance between these kinds of facilities and an industrial operation, it is said, is purely superficial and ignores the vast differences between them.

(ii) Commodity-Specific Sector Model

The Task Force considered briefly an alternative that is a variation on the approach based on the resemblance of a farm to an industrial operation. This alternative model is based on a selection of the sectors of agricultural and horticultural production that typically operate in accordance with industrial or factory style principles. For example, it might be provided that the Act will apply to persons employed in operations primarily engaged in incubation, in the growing of mushrooms, flowers and nursery products, but not to those operations primarily engaged in the raising and feeding of livestock and fowl and the production of field crops, fruits and vegetables. A review of Table 5 in Study 1 indicates that the effect of provision of this kind is to extend the Act to something in the order of 4,500 employees (or full time equivalents).

There are three advantages to a model such as this. It sets up a more definable standard, since it would be relatively easy to determine into which sector a farm's primary production falls. This kind of approach is conducive to certainty and less litigation. Secondly, this kind of approach permits a carve out of sectors that are particularly vulnerable to product spoilage or loss of livestock in the event of a work stoppage. At the same time, it permits the designation of sectors that do not differ all that much from, say, the food processing sector, in that they are characterised by production cycles that are short in relation to other sectors of agriculture.

The agricultural community has expressed general and strong opposition to the sectoral approach. One of the principal objections is that the distinctions are arbitrary, in that there is no basis for deciding to extend the Act to employees of mushroom farms and nurseries but not to employees of greenhouse vegetable growers or indeed tree fruit growers. Moreover, many of the operations affected by the sectoral approach can properly still be characterised as "family farms", as described above. Another concern is that each of the designated sectors, because they employ production methods requiring continuous maintenance, remain extremely vulnerable to work-stoppages. In a mushroom operation, for example, mushrooms must be harvested within four to six hours of attainment of maturity.

Finally, the agricultural community has expressed the view that any kind of sectoral approach is inconsistent with the objective of advancing the interests of social equity, since the approach denies organizing rights to significant parts of the agricultural workforce.

Organized labour does not support this approach either, on the basis that it is not consistent with the continued exclusion of employees of the family farm from the provisions of the Labour Relations Act.

(iii) Threshold Model

The Task Force also examined variations of a model based on some kind of numerical threshold the attainment of which triggers the application of the Act.

For example, it is possible to stipulate that the Act applies only to employees of operations that have a gross annual payroll of a certain size. Alternatively, it is possible to stipulate as a threshold a number such as gross annual sales or revenue. The principal advantage of such a model is the clarity of the applicable standard, but given the fluctuations to which any of the stipulated numbers can be subject on an annual basis, the approach is not conducive to certainty, predictability or stability. It is also not conducive to accurate self-reporting. That is, any number of enterprises can be over the threshold in a given year but under the threshold in another year. Of the numeric thresholds available, annual payroll is probably one of the more stable indicators.

The Task Force focused particular attention on the threshold model based on the minimum number of employees. While the numeric thresholds suggested above are without precedent, the labour statutes of New Brunswick and Quebec stipulate a minimum bargaining unit of, respectively, five and three employees. The rationale underlying these minimum numbers is to exclude from the labour statutes farms of a certain size that are, presumptively, family farms.

The function of the minimum bargaining unit restriction appears to be to exempt family members employed on farms from the reach of the statute, and to reflect a protective attitude towards the "family farm". As the few cases on this issue under the Quebec Labour Code suggest, the distinction is driven primarily by the consideration that the employees of commercial agricultural enterprises ought to have the benefits of collective bargaining enjoyed by other workers. A smaller operation can be described as, and commonly is, a "commercial" enterprise, but is by definition excluded.

The agricultural community is generally opposed to such a threshold. The basis for its position is the arbitrary operation of the threshold in its effect on similarly situated farms differing only slightly in numbers of employees. From a different, somewhat unexpected perspective, certain farm operators willingly assuming the mantle of "agribusiness" for purposes of making submissions to the Task Force objected to exclusion of the "family farm" from the provisions of the Act because it would put agribusiness at a competitive disadvantage with respect to family farm operators. The point they are making is the same as the argument advanced by the farm community as a whole.

The agricultural community points out further that a minimum bargaining unit approach is arbitrary as well because it assumes that only employees of operations of a certain size are deserving of the right to organize and collectively bargain, and precludes access to that right if farm workers wish to organize. In essence, it is difficult to justify this threshold in light

of the purpose of the statute, as embodied in the preamble to the Act, and the treatment of all other sectors.

(c) Repeal of present exclusion

A further alternative is offered by jurisdictions such as British Columbia, Saskatchewan, Manitoba, Nova Scotia and Prince Edward Island, which do not distinguish between agriculture and any other sector for labour relations purposes.

The British Columbia legislature in 1975 had before it the same range of options as are before this Government and decided that employees of all farm operations, regardless of size, are entitled to the benefits of statutorily sanctioned collective action available to most other employees. Although the Select Committee recommended extending the benefit of all of the provincial labour standards legislation to farm workers, the Legislature took only the step of including all farm workers within the ambit of the Industrial Relations Act.

The decision of the British Columbia Legislature has been justified on a number of grounds.[2] It assures equity in the application of the labour relations statute. It does so on the tacit basis that agriculture is really no different, for labour relations purposes, from any other enterprise. The government of the day took the position that the model of labour relations that is based on the ultimate sanction of the strike/lock-out is the best model of labour relations. Underlying this assertion is the conviction that this model provides the most efficient and effective method of resolving labour disputes in all sectors of the economy including the primary production sectors such as agriculture, horticulture and logging.

The Task Force, in reviewing the alternatives before the Government, has come to a different conclusion.

The Task Force recommends that:

- **all persons employed in agriculture and horticulture have access to the right to organize and to bargain collectively;**

- **such right to organize and to bargain collectively be subject to an absolute restriction on the right to strike/lock-out in the event of a contractual dispute.**

In the view of the Task Force, the right to organize should be available to employees in all sectors, including the agricultural sector, in Ontario as it is in most other Canadian jurisdictions. After considering all arguments and hearing all submissions, the Task Force has concluded that distinctions based on the nature of a farm operation or on the size of its workforce or on some other comparable threshold criteria are not justifiable. Although the members of the Task Force representative of organized labour are also supportive of a limited extension option, they join with the other members of the Task Force in recommending that all persons employed in agriculture and horticulture have access to the right to organize and to bargain collectively.

The Task Force further recommends that the extension of the right to organize and collectively bargain to persons employed in agriculture and horticulture be subject to an absolute restriction on the right to strike of any person so employed.

It is the view of the Task force that the limited extension model as it has been implemented in New Brunswick and Quebec and the unqualified extension of the labour relations statute to all farm workers in British Columbia represent incomplete solutions. The deficiency common to the approaches adopted in these jurisdictions is that they fail to address the issue that is fundamental to the regulation of labour relations in the agricultural sector: the role of the work stoppage.

The Task Force recognizes the important role played by the strike/lock-out in a consensual, free collective bargaining system. The Task Force also recognizes that the strike/lock-out mechanism, as the ultimate sanction in the event of the failure of the collective bargaining process, is generally accepted as having proven its value in regulating workplace relations and reducing industrial conflict. The Task Force accepts the view, borne out by data demonstrating that parties to collective agreements in Ontario resort to the work stoppage in only a small percentage of all bargaining situations, that the seriousness of the sanction represents a significant disincentive to frequent use of the sanction.

The Task Force takes the view, however, that a system that has proven itself successful in the sectors traditionally covered by the Labour Relations Act will not necessarily serve the best interests of any of the parties or the public unless it is sufficiently modified to reflect the particular needs and characteristics of the agricultural sector.

It remains true that work stoppages continue to occur however much the serious implications of the work stoppage for both employees and their employers may tend to discourage resort to the strike/lock-out. The gravity of a well-timed strike in the agricultural sector has, with the possible exception of the food processing industry, no parallel elsewhere in the Ontario economy. As noted in this Report, a two day strike at point of harvest or a two day interruption in the husbandry of livestock would have disastrous consequences for both the farmer and his or her employees, particularly in the event that the Labour Relations Act prohibits the use of replacement workers. The risk of a potentially staggering cost associated with a work stoppage in a particular situation seems, in the Task Force's opinion, to outweigh the benefits associated with an unqualified right to strike.

The agricultural sector also differs from other sectors of the economy in some very significant respects. It differs in the extent to which commodity outputs and prices are regulated in Ontario's supply-managed system. Since the organization of farm workers may, at least in the short term, tend to exert upward pressure on a farm's input costs, it is important to ensure that the regulation of agricultural labour relations is responsive to the exigencies of a supply-managed system.

The seasonal nature of agriculture also calls for differential labour relations treatment. The harvest season is the sole determinant of economic viability and is characterised chiefly by its shortness. As noted above, a farm at harvest is particularly vulnerable to job action;

conversely, a farm not at harvest is relatively insulated from the effects of job action. There is in each of these situations an inequality of bargaining power, an inequality that would not be addressed by merely repealing the exclusion without significant qualification.

The harvest period is also, of course, the point at which employment is highest on the farm. As Table 5 in Study 1 indicates, over one half of the farm labour force is seasonal, and a significant number of farms supplement their labour needs by hiring employees on a casual, part-time or piece-work basis or, less commonly, by means of farm labour contractors. The relative instability of the agricultural labour force raises a number of issues that may not be adequately addressed by the current statute, which is in a real sense predicated on the stability of the work force.

The Task Force also takes notice of precedents for differential treatment of particular sectors: the hospital sector and the construction industry. The provisions of the Labour Relations Act applicable only to the construction industry were in part designed to ensure that an inherently unstable workforce, employed in an industry that is at once cyclical and sporadic, would be guaranteed some measure of collective representation.[3] There are parallels between the agricultural sector and the construction industry.

It is with considerations such as the foregoing in mind that the Task Force recommends an alternative model for regulating labour relations in the agricultural sector. It is the view of the Task Force that the model represents an effective means of reconciling the interests of the public, the Government, the farm worker, the farm employer and organized labour.

From a public policy perspective, in the opinion of the Task Force, the efficiency losses from a labour relations perspective associated with a strike substitute are far outweighed by its advantages: prevention of employer-employee conflict in the agricultural sector; facilitation of farm worker organization with resultant enhanced stability in the agricultural labour market; maintenance of a rational correlation between labour input costs and product prices; assurance of continuous care of the animal and plant life in the custody of the farmer and the farm worker; assurance of continuous production of food at socially acceptable costs; and greater certainty in the allocation of risks and costs within the agricultural industry.

B. Resolving Collective Agreement Disputes

The Task Force has acknowledged the importance of the strike/lock-out mechanism and its effectiveness within the current industrial relations system, and has expressed the reasons why it feels constrained to reject it as inappropriate for the agricultural sector. The Task Force is also concerned, however, that the alternative dispute resolution mechanism adopted for the sector achieve as nearly as possible the same results as a labour relations regime grounded on the ultimate sanction of the strike. That is, resort to the mechanism in cases of a failure of collective agreement negotiations ought to put the parties in a position as close to the position they would have been in had the avenue of a strike/lock-out been available. In short, the best dispute resolution mechanism would be one that encourages responsible bargaining to the same degree as the threat of a strike or lock-out.

Having reviewed different models of dispute resolution as an alternative to the strike/lock-out, the Task Force recommends:

- **the prohibition of the right to strike or lock-out and substitution of a dispute resolution process that:**

  - **emphasizes the preference for negotiated settlements between the parties;**

  - **provides a conciliation and mediation service to assist the parties in reaching a negotiated settlement;**

  - **provides an arbitration process for the final and binding resolution of all outstanding matters between the parties following exhaustion of the negotiation process.**

The commonest form of resolving disputes arising in the course of collective bargaining where there is no recourse to strike or lock-out in Canada is conventional interest arbitration. It has been the method of choice in the regulation of public sector labour relations in Ontario and is available to private sector parties under Labour Relations Act, although it has not been much used. In addition, the Hospital Labour Disputes Arbitration Act, which applies to any hospital employee to whom the Labour Relations Act applies, provides an example of the substitution of an arbitration mechanism for the right to strike or lock-out in respect of a sector that would otherwise be covered by the Labour Relations Act.

The assumption underlying the free collective bargaining model with its ultimate reference to the strike/lock-out is that the parties are in the best position to fashion the optimal agreement. The theory underlying compulsory interest arbitration is that it is better to insert the judgment of the arbitrator for the judgment of the parties who would on their own not be able to reach an agreement. This theory is buttressed, in the case of the public sector, by the concern that a work stoppage would be contrary to the public interest.

In the view of the Task Force, conventional models of interest arbitration suffer from a number of disadvantages. Most of them arise from the fact that, to one degree or another, compulsory interest arbitration inevitably involves abdication of responsibility to bargain to resolution all critical issues between the parties. The result may be unrealistic settlements that do not serve the parties' long-term best interests. Such a scenario permits the parties to blame the arbitrator rather than themselves for a poor result. Further, the process gives the parties license to bargain irresponsibly in the hope that the arbitrator's solution will favour one party's position over that of the other. Alternatively, the process encourages inflated positions because it proceeds on the widely held assumption that the arbitrator will come down somewhere in the middle.

The Task Force takes notice of studies demonstrating that, in comparison with strike regimes, compulsory interest arbitration significantly reduces the likelihood of negotiated settlements.[4] Three reasons are commonly advanced to explain the phenomenon. First, the cost of not settling--an arbitrated settlement--is lower than in a strike based system, and therefore more willingly assumed. Second, parties are reluctant to make concessions during

bargaining since they are concerned that any concessions would narrow the differences between the parties to the detriment of one of the parties in the event that arbitration occurs. This is generally regarded as the "chilling effect" of compulsory arbitration. Third, to this effect may be added the "narcotic effect": arbitration is habit-forming, and permits the parties to rely on arbitration to the detriment of their ability to make difficult decisions.[5]

For these reasons and in light of the concern of the Task Force to ensure that the method of dispute resolution in the agricultural sector results in cost-effective solutions acceptable to both sides, the Task Force has serious reservations about conventional interest arbitration. It favours, instead, a model that encourages both cooperation and responsibility in the bargaining process.

Since a settlement negotiated between the parties represents the best result in the collective bargaining situation, the model appropriate in the agricultural sector must encourage cooperative negotiating behaviour by means of some form of accommodative process. Accordingly, the Task Force is of the opinion that mediation should be compulsory once the parties have reached impasse on outstanding issues. Given the goal of achieving negotiated settlements, the Task Force considers it appropriate to make mediation available as an adjunct to negotiations, before an impasse is reached. This type of preventive mediation may be of critical importance in the agricultural sector, since both employees and employers will be unfamiliar with the collective negotiation process.

In the view of the Task Force, the likelihood of a negotiated settlement would increase if one of two methods of interest arbitration were adopted.

Mediation-arbitration

The Task Force considered the possibility of empowering the mediator to act as arbitrator and settle all outstanding issues between the parties. The central role that the arbitrator assumed as a mediator prior to the break down of the negotiation process ensures that the mediator's judgment is fully informed. The arbitrator in these circumstances is more likely to make a decision that is a reflection of the parties' realistic expectations had they been able to determine them. At the same time, the risk of settlement by an informed arbitrator may encourage a party to take a more vigorous role in negotiations in response to the risk that an informed arbitrator may adopt a position that does not favour its interests.

This model would have the effect of raising the costs of not settling prior to arbitration, since the risk of not negotiating an issue with the assistance of the mediator is that the mediator is in a position to impose a resolution that may not be as desirable as a negotiated resolution. While this is a desirable outcome, the Task Force is concerned that the mediator may no longer be sufficiently detached from the parties when the time comes for him/her to decide the issues. Consequently, the Task Force takes the position that it should be left to the parties to determine whether or not, upon the failure of mediation, the mediator should continue to act as arbitrator.

Final Offer Selection

The Task Force also considered a model of arbitration common in the United States but little used in Canada: final offer selection.[6] This type of arbitration requires that the parties each put before a selector a single final position. The power of the selector is limited to choosing between the positions in light of his or her understanding of the situation; the selector is not free to deviate from the positions presented, although he or she may be empowered to send the parties back to reconsider their positions should both be unrealistic.

The principal advantage of final offer selection appears to be that such an arbitration mechanism promotes settlement more effectively than a conventional arbitration system. The Task Force notes data that indicate that, while the rate of settlement under a final offer system tends to be lower than the rate of settlement under a strike-based system, it is significantly better than the rate of settlement under conventional arbitration.[7] Of all the non-strike-based models, this all or nothing mechanism may offer the greatest possible incentive for a negotiated settlement. That incentive may be further increased by a statutory preference for extensive mediation.

The Task Force is also aware that the single greatest disadvantage to final offer selection is a by-product of its chief strength: the rigidity of the system is ideally suited to resolution of compensation-related items in dispute, but ill-suited to the disposition of non-compensation items such as management rights or job security. More detailed study may well suggest refinements to the model to overcome the deficiencies associated with its rigidity. For example, it is possible to conduct the final offer process on an item by item basis (in which the selector chooses between two offers on each item remaining in dispute). Or it may be possible to separate matters of compensation from non-monetary items and deal with each group on a package basis.

The members of the Task Force representative of organized labour are prepared to recommend final offer selection as the method of labour arbitration that should be adopted in the agricultural sector. In their view, the chief merit of this mechanism, its effectiveness in encouraging parties to seek their own settlement short of arbitration, is compelling enough to overcome any of the objections levelled at the method.

It is the view of the members representative of the agricultural community, however, that the Task Force is not in a position to analyze exhaustively the relative advantages and disadvantages of the arbitration models discussed above. Although they agree with the members representative of organized labour that the effectiveness of final offer selection is quite compelling, in the light of the recognized deficiencies of the mechanism, they consider that further investigation into the available mechanisms and potential hybrids is necessary.

C. Administration of Agricultural Labour Relations

The Task Force recommends:

- **the creation of a separate statute for the agricultural sector, the Agricultural Labour Relations Act;**

- **the continuation of a Task Force with a mandate to advise on the design of an agricultural labour relations statute and accompanying administrative structure as well as supportive educational programs for participants to the process by September 30, 1992. If there are matters that have not been resolved, discussions on the outstanding issues can continue provided that there is unanimous consensus of the Task Force members and the approval of the government;**

- **the creation of a conciliation, mediation and adjudicative services, with expertise, for the purpose of administering the Agricultural Labour Relations Act and assisting the parties in matters relating to labour relations;**

- **the establishment of educational programs, through existing agricultural organizations, to ensure that participants become and remain informed in matters of labour relations.**

(a) Statutory Framework

Submissions from the agricultural community commonly take the position that the Labour Relations Act as it is presently constituted is inappropriate for the regulation of disputes in the agricultural sector. The Act, it is said, was designed to regulate disputes in the industrial sector and is not, as such, sufficiently responsive to the unique characteristics of agriculture. That regulatory environment is not sensitive to the implications for labour relations in the agricultural sector of factors such as seasonality, climate sensitivity, time sensitivity, supply management and the need for maintenance of continuous processes to ensure the survival of animals and produce.

As such, the agricultural community is of the view that the effective regulation of labour relations in its sector requires the development of a separate regulatory framework that addresses the special concerns of agriculture. Two complementary arguments buttress this position.

The recommendation of the Task Force to extend collective bargaining rights subject to a restriction on the right to strike invites consideration of a distinct regulatory framework for the sector because it in effect creates a different kind of labour relations system. This would be particularly the case should it be determined that a more elaborate mediation-arbitration procedure be implemented. Significant portions of the present Labour Relations Act would be irrelevant.

Precedents for a separate statutory vehicle for the alternative, non-strike system are provided by the Crown Employees Collective Bargaining Act (CECBA) and the Hospital Labour Disputes Arbitration Act (HLDAA). The public policy considerations underlying the differential treatment of public servants and hospital employees in these statutes are arguably not different for persons employed in agriculture.

The second argument proceeds from a recognition that persons employed in agriculture have more in common with employees in the construction industry than they do with industrial or commercial employees. As such, there is an argument that they and their employers should be at least as differentiated from non-agricultural employees as are employees employed in construction. As Table 5 in Study 1 indicates, roughly one half of the total person year equivalents of hired labour in the agricultural sector are seasonal. To the pool of seasonal labour must be added that part of the farm workforce that is part-time, casual, composed of students or contracted in. The resultant picture is one of a fragmented, mobile and non-cohesive workforce.

The Task Force has concluded, in light of the foregoing considerations, that the differential treatment of agricultural labour relations recommended in this Report requires the development of a separate statute. The next issue is the degree of separateness.

One model is provided by the statute governing labour relations in the public sector, CECBA, which constitutes an entirely separate, parallel labour relations system. Another is provided by HLDAA, which is in effect an arbitration regime engrafted onto the Labour Relations Act in place of the strike regime applicable to a sector that is otherwise subject to the terms of the Act.

The members of the Task Force representative of the agricultural community insisted that the distinctiveness of agriculture merits an entirely separate statute. In their view, the regulation of labour relations in agriculture would require significant modification of so many fundamental provisions of the Labour Relations Act as to justify a separate approach. They pointed, in particular, to the provisions of the Act dealing with the definition of "dependent contractor", the inclusion in the bargaining unit of family members who may act in a supervisory capacity, access to employer property for organizing purposes, certification and the determination of whether or not employers are related employers or successor employers for purposes of ensuring continuity of bargaining rights.

It is the position of the members of the Task Force representative of organized labour and of farm workers that an approach that would result in a separate statue comparable to HLDAA would be adequate. That is, the agricultural labour relations statute would provide the vehicle for the dispute resolution mechanism that is triggered when negotiations break down. The assumption here is that there is no justification for altering those well-established provisions of the present Labour Relations Act that set out fundamental principles, certification procedures, content of collective agreements, rules to regulate employer and union conduct, a rights arbitration procedure and a complaint and enforcement process. The members representative of workers also took the view that the non-applicability of the right to strike and all the related provisions in the Act will so modify the Act as to remove the principal objections of the agricultural community.

In the view of organized labour, there is no justification for going further, since the consensus recommendation recognizes the necessity of setting out an alternative to the strike mechanism in a separate statute. In the view of these members, the process of developing a separate statute permits ample scope for the detailed investigation of those areas, such as access to employer property for organizing purposes, that require special consideration in the agricultural context. They also pointed out that the disposition of cases raising questions of, for example, successorship or the relatedness of employers ought to be left to the Board making determinations on the basis of specific facts.

It was pointed out in the course of discussions that even in those few American states that have legislated in the area of agricultural labour relations, there is extensive reliance on the federal labour relations statute on most fundamental matters. The agricultural labour legislation of Kansas, Idaho, Arizona and California, it was suggested, to one degree or another do little more than graft onto the federal statute some special considerations relevant to the agricultural sector and designed to dampen the ability to organize. California's Agricultural Labour Relations Act is the most extensive, and innovative, of the American statutes, as a result of its intention to promote the self-organization of farm workers.

The members of the Task Force representative of the agricultural community do not strongly dissent from the view expressed by the labour members. However, they expressed the reservation that the separate statute, in addition to setting up a dispute resolution procedure, should be conceived broadly enough to accommodate variations to existing labour relations law in accordance with the special needs of the agricultural sector. Provisions determined in the course of subsequent study and consultation with employees and employers in the agricultural sector to be inappropriate could simply be deemed inapplicable. Conversely, new rules to accommodate the special characteristics of agriculture, such as the determination of the appropriate bargaining unit, can simply be added.

If a concern remains as to the qualifications of the OLRB to deal with labour relations issues in the agricultural sector, it can always be specified that such issues can be adjudicated only by an agriculture industry panel, on the analogy of the rather specialized construction industry panels of the Board that now hear cases in that sector. Disposition by panels so specialized would provide substantial guarantees that the application of the Labour Relations Act would respect the different considerations applicable to the agricultural sector.

Against these contending considerations, the Task Force forged a consensus that recognizes at once the universality of the principles at the base of the Labour Relations Act and the distinctiveness of agriculture.

(b) Administration

It is common ground of the Task Force that the effectiveness of dispute resolution in the agricultural sector will depend on the development of an administrative mechanism that will achieve certain objectives. It would facilitate the self-management of labour relations in the

agricultural sector; provide mediation and arbitration services expeditiously and at low cost; ensure that mediators and arbitrators are expert in matters of both labour relations and agriculture, in the techniques of mediation and arbitration as well as in the technicalities of inputs costing and commodity pricing; and ensure a rational, informed decision-making process.

In view of the absence of any history of collective bargaining in the agricultural sector, another important function of the administration would be to provide guidance in the early stages of the development of labour relations practices in the sector.

The Task Force reviewed four models of administration.

Brief consideration was given to a formal, institutional model, such as an independent agricultural labour relations tribunal. Its mandate would be to provide an integrated labour relations service to parties at every stage of the bargaining process, including mediation assistance throughout the negotiation process, arbitration and other accommodative services to facilitate a negotiated settlement. Another function of this body would be educational, an important function given the novelty of the collective bargaining process in the agricultural sector. The tribunal would be staffed by experienced mediators and adjudicators drawn from both the arbitral community or the Ontario Labour Relations Board and the Ontario Farm Products Appeals Tribunal.

The Task Force rejects this administrative model on the grounds of cost and concern that it will result in the entrenchment of a new bureaucracy to administer labour relations in the agricultural sector. Farmers, farm workers and unions all expressed concern over the growth of a new bureaucracy. Such a mechanism would also be inconsistent with the principle of the self-management of labour relations. The Task Force also considered and rejected a model of administration that would present a minimal structure, on the ground that a degree of guidance would be required to ensure that the novel system of agricultural labour relations functioned effectively and efficiently.

Two other, complementary models were considered which more nearly meet the objectives of the Task Force. What they have in common is that they make use of and enhance existing administrative structures.

The Task Force considered enhancing the powers of the Ontario Labour Relations Board to arbitrate interest disputes. It should be noted that, given the Board's expertise in labour relations, it is the only realistic choice for the administration of agricultural labour relations up to mediation and arbitration, (certification, unfair labour practices, duty of fair representation and so forth). The Task Force considers it important to specify, however, that cases involving agricultural labour relations be adjudicated by specialist panels of the Board. The precedent is provided by the construction labour relations panels now in place to hear disputes in the construction industry.

With respect to interest arbitration, the Task Force notes that the Board already has limited authority to arbitrate contract disputes in the situation in which parties to a first collective agreement fail to reach agreement. The Government's preferred option for reform of the

first contract arbitration provision, section 41 of the Act, would expand the Board's jurisdiction to arbitrate collective agreements. The personnel needs generated by a further expansion of this jurisdiction could be met by appointing adjudicators and arbitrators expert in agricultural matters and by cross-appointments from the Ontario Farm Products Appeals Tribunal. Such measures would ensure that the requisite degree of expertise would be in place when the parties require it.

The Task Force recognizes that the roster of mediators and arbitrators trained and made available by the Ministry of Labour represents a significant source of mediation and arbitration experience. The Task Force proposes that the Ministry of Labour, in consultation with the Ministry of Agriculture and Food and with the parties, set up a special roster of mediators and arbitrators expert in labour relations and agriculture. This roster would provide a source of informed and expert mediation that could be available at any stage of the negotiation process, as well as a source of arbitral expertise that the parties could draw upon to resolve disputes over the interpretation or application of collective agreements.

The capacity of this model to meet the objectives of the Task Force is enhanced by the extensive reforms to the processes of the OLRB and to the arbitration system that the Government intends to introduce this year. The reforms will lower system costs, costs to the parties and speed up the adjudication process.

The Task Force also considered another, less institutional mechanism, really a type of bi-partite steering committee, designed to address the need to provide overall guidance in the early stages of the development of a system of labour relations in the agricultural sector. The mechanism could be a body composed of representatives from the Ministry of Agriculture and Food and the Ministry of Labour, farm employers, farm workers and unions active in the agricultural sector.

The role of this committee could be to advise the government in all areas of agricultural labour relations, including training and education in matters of labour relations. The committee could also play a critical role in systematizing the disposition of grievances arising under collective agreements throughout the agricultural sector in a timely and cost-effective manner. It would be the task of committee, or a sub-committee thereof, to pre-select a panel of grievance arbitrators, possibly on a sector-by-sector basis. To achieve the ends of expedition and cost-effectiveness, provision could be made for disposition of grievances by single arbitrators who will hear cases in an expedited manner, preferably without intervention of counsel, and render decisions without written reasons.

The Task Force feels that two other issues must be addressed in the administrative context: costs and education.

This Report has on a number of occasions drawn attention to the circumstance that there is no history of collective bargaining in the agricultural sector. Moreover, a common theme of submissions from the agricultural community is that the farm community, both owners and workers, because it is so new to labour relations, does not possess the background and the vocabulary to assess adequately the impact of the government's proposals.

In light of these very real considerations, the Task Force would like to emphasise the importance of ensuring that the mechanism developed to administer labour relations in this sector will also facilitate the education of both farm employers and farm workers in matters of labour relations. This objective can be achieved by making use of existing educational structures in the agricultural sector, the Ontario Agricultural Training Institute and the five agricultural community colleges.

On the question of costs, the Task Force takes the view that the costs of mediation and all other services designed to facilitate a negotiated settlement up to but not including arbitration should be covered, as they are now, by the government. The costs of arbitrated settlements should be borne equally by the parties to a collective agreement dispute. Although the members of the Task Force representative of agriculture expressed concern that the costs of arbitration might prove onerous, the Task Force is mindful of its observation earlier in this Report that cost is a significant spur to a negotiated settlement. At the same time, in the interest of reducing potential exposure in difficult negotiation situations, the Task Force advises that arbitrator's fees be statutorily limited to a fixed tariff determined by the administrative authority in place.

D. The Appropriate Bargaining Unit and Other Issues

A principal concern of the Task Force is the question of what is the appropriate bargaining unit for purposes of labour relations in the agricultural sector. In the course of exercising the discretion conferred upon it by section 6 of the Labour Relations Act, the Ontario Labour Relations Board has developed a number of principles to help guide it in determining the unit of employees appropriate for purposes of collective bargaining. Those principles especially relevant to the agricultural context may be quickly summarized.

Seasonal workers or those employees hired on a cyclical basis are generally placed in the same unit as year-round full-time employees on the basis that they share a community of interest. Thus, in any application for certification of the unit, the unit is usually defined to include all full-time employees, be they regular seasonal hires or year-round employees. A long-standing exception has been made for the canning and tobacco harvesting industries, in which the bargaining unit is defined in accordance with the employees employed on the date of application for certification, be it peak season or low season. The underlying rationale for this exception seems to be a recognition that the facilitation of organization and collective bargaining in a purely seasonal industry invites different considerations.

Part-time workers and students do not share many of the collective interests of full-time employees, and may not even share interests with one another, but are combined in one unit to ensure that students have access to collective rights and form a viable bargaining unit. With respect to employees of contractors hired to carry out a multiplicity of duties in a great variety of farm operations, to the extent that his employer is an independent contractor, that person is the employer of the employees for purposes of labour relations. Finally, the Board does not recognize a category of worker as "casual" and has no policy to deal with off-shore workers.

The Task Force recognizes that the appropriate treatment of seasonal labour is critical, given that seasonal labour accounts for roughly one half of the total employment in agriculture. It notes that the great majority of farms are small farms that rarely employ, in addition to family members, more than seasonal and/or part-time labour. Although larger farm operations (those employing five or more person year equivalents of hired labour) also hire substantial numbers of seasonals, they tend to employ more year-round employees than seasonal employees. Another notable, if obvious, characteristic of the seasonal workforce is that it is mobile, diverse and generally non-cohesive.

The Task Force has not been able to come to an agreement on the issue of what is the appropriate bargaining unit. It is the position of the members of the Task Force representative of organized labour that the bargaining unit on a farm should consist, in accordance with the OLRB's normal rule, of the employees in the proposed unit on the date of the application for certification. These members take the further view that there should be only one bargaining unit consisting of all of the agricultural employees on the farm, including full-time, part-time, seasonal, student and off-shore employees.

The members representative of organized labour advance three arguments in support of this position. It is argued, first, from the perspective of the employees, that such a policy ensures that all farm employees have access to the right of collective representation. Secondly, it is argued that a "wall to wall unit" as proposed will benefit farm employers since it requires them to deal with a single rather than a multiplicity of units and will result in greater workforce stability. Thirdly, in accordance with the normal OLRB policy on the question, seasonal workers are really shorter term full-time employees and the two types of employee share a community of interest. This is particularly true given that seasonals are often re-hired the next season.

The members of the Task Force representative of the agricultural community, including farm workers, take a different view. It is their position that distinctions must be drawn between types of seasonal employees on the basis of length of employment. The purpose of such an approach would be to exclude from organizing and collective bargaining the most unstable segment of the farm workforce--those employed for short periods of time at the critical point of harvest--and ensure that the longer-term seasonal employee, who is commonly a re-hire from a previous season, has access to collective representation. This policy would also exclude a significant proportion of off-shore employees brought in under the auspices of Canada Employment and Immigration programs.

It is the view of the members representative of agriculture that longer-term, regular seasonals do share a demonstrable community of interest with regular employees. It is also their view that shorter term seasonals do not share the interest of full-time regular employees in such matters as benefits, pensions, training and long-term advancement prospects. It is argued that the Board's different policy for the tobacco harvesting and canning industries reflects a recognition of these employment realities in agriculture. In their view, such considerations should inform the policy guiding the determination of agricultural bargaining units.

The members representing agricultural interests felt that considerations of seasonality should be reflected in the rules governing certification as well. That is, in their view, the current rule providing that the union will be certified on the basis of the members in the proposed bargaining unit on the date of application (and other aspects of the certification process) may require modification in light of the seasonal variations of the farm workforce.

It was pointed out in the course of discussion, however, that manipulation of the date of application or of bargaining unit composition either to exclude or include some or all seasonal employees can be a double-edged sword. An example is provided by a comparison of the agricultural labour relations legislation of the four U.S. states that have legislated in this area. Commentators have observed that those statutes designed to discourage organizing in the farm sector, such as the Arizona agricultural labour legislation, tend to require units composed of both regular and seasonal employees, on the theory that seasonal employees would tend to reject organization. The liberal California statute similarly requires all-employee units representing at least fifty per cent of the peak seasonal workforce, on the theory that this would ensure the greatest possible access to collective bargaining.

The members of the Task Force representative of organized labour do not agree that a special certification system is appropriate, largely because they are wary of employer attempts to manipulate the labour force in order to avoid certification. The members of the Task Force representative of organized labour noted, moreover, that the principles expressed in the preamble to the Labour Relations Act require the adoption of certification rules that encourage the practice of organization and collective bargaining. A restrictive approach cannot be justified in light of the purposes of the Act.

More broadly, the members of the Task Force representative of the agricultural community took the position that the operation of a number of significant provisions of the Labour Relations Act ought to be reconsidered in the context of agricultural labour relations. One of these was the definitional question of whether a person is an independent contractor or a dependent contractor (a person who performs work or services for another in such a way as to be economically dependent on that other). It was suggested that the contractual arrangements in the farm sector, such as the institution of share cropping, may provide a basis for a new definition of "dependent contractor".

The other concerns also related to the peculiarity of agriculture for labour relations purposes: the agricultural environment requires special rules to govern access to farms for organizing purposes; the rules that the Board has developed to determine whether two employers are related or not does not take into account the structure of ownership of various farm enterprises that is a response to the needs of the sector; and the Board's tests for determining the existence of a successor relationship between vendor and purchaser for labour relations purposes does not take into account the importance of the land on a sale nor the migratory nature of the labour force. The agricultural members also expressed concern over the Government's intention to permit front-line supervisors to organize, since such supervisors on a farm would commonly be family members.

The members of the Task Force representative of organized labour agree that the agricultural sector merits special consideration in matters such as access for purposes of organizing or in the context of secondary picketing (refusal to handle goods of a struck employer). They do not, however, accept that the agricultural sector should be subject to rules designed to prevent employers from escaping their collective bargaining obligations that are different from those applicable to any other employer. In their view, the appropriate disposition of cases on these issues should be left to a specialist panel of the labour board that recognizes the distinctive concerns of the agricultural community within the existing legal framework. It was noted in discussion that questions of continuity of bargaining rights are largely factual questions most appropriately left to an informed tribunal for determination in light of the broad statutory provisions.

The members representative of the agricultural community did not take issue with the positions adopted by the labour representatives. Rather, they considered it most appropriate that the areas demarcated as potential matters of concern for the agricultural community be remitted for further consideration in the context of the development of a separate labour relations regime for the agricultural sector.

Notes

1. Wellington Mushroom Farm, [1980] O.L.R.B. Rep. May 813
Cuddy Chicks Limited, [1988] O.L.R.B. Rep. May 468

2. See the discussion of the British Columbia Labour Relations Board in South Peace Farms and Oil, Chemical and Atomic Workers International Union, Loc. No. 9-686 (1977) Can. L.R.B.R. 441, and Debates of the Legislative Assembly (Hansard), June 26, 1975.

3. The remarks of Paul Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (1980), are instructive (at p. 183): "The character of the employment relationship in the construction industry is very different from what it is in the typical plant. There is no footing for the kind of tenured status which employees now enjoy under most collective agreements. As well, there is no basis for the kind of enduring association which a group of employees can develop in an industrial bargaining unit. Any one job for the construction worker is short and fleeting, and he must be prepared to be highly mobile, shifting from project to project across a wide geographic area."

4. See for example Ponak and Falkenberg, "Dispute Resolution Procedures under Canadian Collective Bargaining" in 14 Australian Bulletin of Labour (March, 1988) 426.

5. Ponak and Falkenberg, loc. cit.,at p. 439ff.; and see, for a more sanguine view, DiLauro, "Interest Arbitration: The Best Alternative for Resolving Public Sector Impasses", in 14 Employee Relations L.J. (Spring, 1989) 549.

6. Final offer selection is commonly regarded as a viable alternative to the strike in the United States. It is at present available in Canada only as a voluntary procedure under the School Boards and Teachers Collective Negotiations Act. Experience with the device has been limited, since the parties under this statute have for a number of reasons generally preferred a strike-based process. In a presentation to the Task Force, the Director of Research of the Education Relations Commission (which administers bargaining under the SBTCNA) indicated that, out of over 3,000 collective negotiation situations, the parties opted for conventional arbitration approximately 60 times and for final offer selection only 13 times.

7. Ponak and Falkenberg, loc. cit., n.1.

APPENDICES

APPENDIX A

TERMS OF REFERENCE
REFORM OF THE LABOUR RELATIONS ACT
AND THE AGRICULTURAL SECTOR

At the invitation of the government, representatives of farm operators and farm workers have agreed to participate in a task force to be established for the purpose of examining the implications of including the agricultural and horticultural sectors within the ambit of the Ontario Labour Relations Act.

The task force is to be comprised of eight persons:

- three nominees representative of the agricultural and horticultural sectors;
- one nominee representative of agricultural workers;
- two nominees representative of labour;
- one nominee from each of the Ministry of Labour and the Ministry of Agriculture and Food.

Objectives

To report to the government on:

- the implications of including the agricultural and horticultural sectors within the ambit of the Labour Relations Act;
- means of inclusion in the Act and alternatives to inclusion in the Act.

Subject Matter

The work of the study group is to focus on the following subjects:

- Special characteristics of agriculture for labour relations purposes
- Whether or not the Labour Relations Act provides the most appropriate regulatory framework for labour relations in the agricultural sector
- Impact of permitting agricultural workers to organize for purposes of collective bargaining

- The practice in other jurisdictions, both Canadian and American

- On the assumption that agricultural workers should be given the right to organize, the means of dispute resolution appropriate in the agricultural sector

- The threshold, if any, that is appropriate for purposes of organization; that is, on the assumption that agricultural workers are given the right to organize, should that right be restricted to operations of a certain size or character, however determined?

Timeframe

- A preliminary report to be presented to the Minister of Labour by the end of February, 1992.

- In the event that the Minister of Labour determines that further consultation is advisable, a second report to be presented to the Minister on May 1, 1992.

APPENDIX B

EXTRACT FROM THE MINISTRY OF LABOUR'S DISCUSSION PAPER, "PROPOSED REFORM OF THE ONTARIO LABOUR RELATIONS ACT" (NOVEMBER, 1991)

2.2 THE RIGHT TO ORGANIZE

The Labour Relations Act recognizes the importance of the right to organize and to participate in collective bargaining. The Act is, however, one of the most restrictive in Canada in that it denies to many employees the right to even make the decision to organize.

The government holds the view that the right of employees to choose whether or not to be represented by a trade union should not be denied - except for the most pressing and significant public policy reasons.

PREFERRED OPTIONS FOR REFORM

a) Maintain the managerial exclusion but amend it to permit supervisory employees to organize and bargain collectively, and require them to be placed in a separate bargaining unit unless the parties agree otherwise.

b) Allow organizing in those parts of the agricultural and horticultural sectors which utilize industrial/factory methods of production, and in the landscape gardening sector.

c) Remove the current exclusion of domestics from coverage under the Act.

d) Remove the current exclusion of professionals from coverage under the Act. The question of whether professionals should be included in the same bargaining unit as other employees would be determined by the OLRB on a case-by-case basis.

e) Permit security guards to join the trade union of their choice, but allow the OLRB to place security guards in a separate bargaining unit where appropriate.

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b) Agricultural and Horticultural Employees

Employees working in agriculture are not permitted to organize and bargain collectively under the Act. Employees in horticulture (e.g., gardening) are also excluded if they are employed by an employer whose primary business is agriculture or horticulture. However, horticultural employees working for a municipality and those employed in silviculture (the cultivation of trees in forestry operations) are not excluded from the Act.

These exclusions affect employees working in both family farm settings and industrial/factory-like settings with large, permanent workforces, including "agribusiness" operations such as mushroom factories and chick hatcheries.

Most other Canadian jurisdictions do not exclude agricultural employees from participating in collective bargaining, although some require a minimum number of employees before organization is permitted (e.g., 3-5).

Nevertheless, the government recognizes the position of many agricultural employers that there may well be circumstances unique to agricultural employees and operations which must be considered in deciding upon the most appropriate mechanism for extending the right to organize to agricultural and horticultural employees. For example, the agricultural community has long argued that small family-run agricultural farming operations present special problems in this area.

For its part, the government believes that there is clearly no justification for denying employees working in factory-style agricultural operations the same right to organize enjoyed by employees working in other industrial or manufacturing sectors of the economy, or for denying the right to organize to employees in the landscape gardening sector. Concern has been expressed, however, that it may be difficult to determine in any particular case whether a group of employees is involved in an industrial/factory method of production. As a result, during the consultation period, the government intends to continue its ongoing discussions in this area with representatives of the farming community, with interested trade unions and with other organizations.

In this context, the government invites consideration of the following questions:

- *What factors should be considered in developing a definition that can distinguish between family farm operations and industrial/factory-type operations?*

- *Should the extension of collective bargaining rights be limited to agricultural employees engaged in industrial/factory-type operations? What other approaches should be considered? (eg., coverage based on a threshold number of employees.)*

APPENDIX C

SUMMARY OF WRITTEN SUBMISSIONS RECEIVED BY THE AGRICULTURAL LABOUR RELATIONS TASK FORCE

The task force received approximately 35 written submissions/letters relating to the removal of the agricultural/horticultural exemption under the Ontario Labour Relations Act. The submissions range from recognizing the need to extend the right to organize, to maintaining the current exclusion.

The majority of concerns raised in the submissions related to work disruptions or stoppages. The restricted time frames for planting and harvesting, perishability of farm products, and the need to provide ongoing animal care have often been cited as key reasons for prohibiting work stoppages and maintaining the current exemption.

Many producers have expressed apprehension over the potential financial difficulties caused by the additional administrative cost associated with collective bargaining, as well as the potential impact that unionization may have on land values. These financial considerations represent additional costs which may be difficult to absorb, given the current economic pressures facing the sector.

The agricultural community has also indicated that it is difficult to distinguish between family and industrial or factory-styled operations. Any method of defining agriculture/horticulture along these lines would be highly arbitrary.

Several submissions have suggested that, if agriculture is to be included under the Act, all farms should be covered. It was pointed out that smaller workplaces could also benefit from inclusion under the Act and that smaller producers should not be given a competitive advantage by remaining exempt from the Act.

A number of concerns have also been raised over access to a producer's property for the purposes of organizing. Providing unlimited access to agricultural/horticultural operations may result in the spreading of diseases to plants and livestock. In some cases, it has been pointed out that the provision may result in the possible violation of the sector's stringent sanitary and health regulations.

A summary of key points raised primarily by agricultural and horticultural associations has been set out below. The summary is structured by issue and is not intended to reflect the full discussions outlined in each of the associations submissions.

Nature of Existing Statute

Ontario Berry Growers' Association

- The present agricultural exemption should be maintained.

- If employees wish to associate they should have that right as long as it does not impact on anyone else.

Canadian Mushroom Growers' Association

- The exemption should remain intact, leaving the industry alone to adjust to the changing world trading rules. The extension of the Act to agriculture would impose a statute on the sector that is not designed for agriculture and would prove to be unwieldy.

- The possibility of province-wide bargaining is of concern to single commodity producers because of the potential shut-down of production for a particular commodity across the province.

Canadian Seed Trade Association

- A labour relations framework that reflects the nature of the agricultural industry, that protects the rights of agricultural workers and employers, is encouraged.

Dufferin County Federation of Agriculture

- Agriculture is a very diversified industry depending on weather conditions, seasonal work, and a wide variety of tasks. The development of unions in this environment will be a detriment to farm operations.

Flowers Canada Ontario

- The present exemption for agriculture and horticulture should be maintained.

- If labour relations legislation is going to be extended to the industry, a separate act should be created which reflects the unique nature of the industry.

Labourers' International Union of North America

- The current exclusion is clearly inconsistent with the guarantees of equality.

Landscape Ontario

- The proposed reforms will encourage polarization and strife in the workplace which will ultimately result in the loss of businesses and jobs.

- The proposed reforms gives U.S. producer's an unfair competitive advantage which may dampen export opportunities.

Ontario Federation of Agriculture

- While we are not opposed to the principle of extending the "right to organize" to farm workers, the applicability of the legislation needs to be revised in order to achieve a balance between employee and farmer rights and responsibilities.

- The current exclusion may be vulnerable to challenges under the Charter of Rights and Freedoms.

- The economic impact of the proposed changes to the legislation must be reviewed before proceeding with the reforms.

- A separate legislative framework for labour relations in the agricultural industry that recognizes the unique features of agricultural production and marketing processes should be developed. The development of such legislation should be carried out in partnership with the industry and should address issues concerning work stoppages.

Ontario Fruit and Vegetable Growers' Association

- Labour relations should be extended to agriculture and horticulture through the development of a separate act that reflects the unique nature of the industry.

- The extension of labour relations must be weighted against the economic uncertainties facing agriculture - GATT, globalization of markets, environmental concerns, etc.

Ontario Hatcheries Association

- Characteristics such as perishability of products and the economics of farm management render collective bargaining under the Act unsuitable for the agricultural industry.

Ontario Milk Marketing Board

- Existing labour relations legislation is designed for industrial settings and should not be extended to agriculture.

- The Board does not oppose extending the "right to organize" to farm workers. However, agricultural workers should be extremely sensitive to the real financial plight of Ontario farmers in these uncertain times with respect to the timing of new labour legislation.

- Any application of labour relations legislation to agriculture must be specifically formulated to meet the unique characteristics of agriculture, including the perishability of products and the ongoing need to feed and care for animals.

Southern Georgian Bay District Fruit Growers

- Agriculture is different from most industries because it is so dependent on nature and weather conditions. As a result, the agricultural sector cannot be treated the same as other businesses and should remain exempt from the Act.

The Ontario Flue-Cured Tobacco Growers' Marketing Board

- The reforms do not lend themselves to the agricultural industry as a whole and agriculture should remain exempt from the Act.

Thedford-Grand Bend Vegetable Growers' Association

- The horticultural industry will be increasingly burdened by the administrative costs associated with unions. Unions lead to greater inefficiencies.

- Inclusion under the Act will strengthen the negotiation position of foreign governments in setting the terms of employment for their offshore workers.

- Many Ontario Labour Relations Board decisions warrant a more democratic system of decision making.

- The proposed reforms are so universal that they do not reflect the nature of the agricultural industry.

- Employees not wishing to join a union should have the right to refuse.

Waterloo-Wellington-Dufferin Agricultural Employment Services

- Waterloo-Wellington-Dufferin Agricultural Employment Services agrees that the status quo is not acceptable and changes to the Act should be made for the betterment of agriculture.

- The outright exclusion for agriculture under the Act is out of step with practices in the rest of Canada. Providing the right to organize is a step forward and would potentially benefit all of agriculture.

- Due to the complexity of agriculture (animal welfare, perishability of products, weather, etc) a separate act should be developed for the sector.

"Definitional" Approach

Ontario Berry Growers' Association

- There is no such thing as "industrialized" farms - a farm is a farm regardless of structure, size, and number of employees.

Canadian Mushroom Growers' Association

- Agriculture cannot be divided into sub-components by arbitrary definitions.

Flowers Canada Ontario

- A family owned and operated farm independent of size and crop grown is a family farm.

- If farming is included in a new Bill both "family" and "industrial/factory" farms needs to be defined.

Landscape Ontario

- The proposal to extend labour relations to "industrial/factory" farms reflects a lack of understanding of the agriculture and horticulture industry. This approach would be divisive.

- Any definition of "industrial/factory" farms will be highly subjective.

Ontario Federation of Agriculture

- Farmers are opposed to the segregation of agriculture based on type of product produced, number of employees, level of technology, gross sales, structure of ownership, marketing methods, or other measures.

- The proposed piecemeal extension of the Act will not further the interests of farm workers and will compound the uncertainties facing farm operators.

Ontario Hatcheries Association

- The agricultural industry cannot be subdivided based on alleged distinctions in methods of production. Any attempt to grant collective bargaining rights on the basis of such alleged distinctions would be artificial and unworkable.

Ontario Milk Marketing Board

- The extension of labour relations to agriculture should be confined to operations that employ in excess of X workers, other than family members.

The Ontario Greenhouse Vegetable Producers Marketing Board

- There currently exists no accepted definition of an "industrialized" farm. A farm is a farm regardless of its structure, size, or number of employees.

Thunder Bay Federation of Agriculture

- Due to the inability to clearly define industrial or factory-styled agricultural operations, agriculture should not be included under the Ontario Labour Relations Act.

Waterloo-Wellington-Dufferin Agricultural Employment Services

- It is difficult to differentiate between factory farms and family farms. Defining the two types of farms will need to be done carefully. The term "factory farm" is not acceptable in Ontario due to its negative connotations. Factory implies many things that do not apply to Ontario agriculture, such as corporate management structures and possible conflicts with the animal rights movement. A new term should be developed to distinguish between the two farm structures based on number of employees combined with a specific management structure.

Work Stoppages

Ontario Berry Growers' Association

- The "right to strike" is confrontational and inappropriate to agriculture.

Canadian Mushroom Growers' Association

- The right to strike is incompatible with farming in any context. Agriculture has inherent risks to start with, that are unmatched in the industrial sector. They come from unpredictable weather, perishable products, insecure markets, and the inability to stockpile inventory.

- Arbitrators who would hear grievances in the agricultural sector must have an understanding of the sector.

Canadian Seed Trade Association

- Agricultural employment in some cases is not the same as assembly-line employment. In the seed corn business, timeliness during detasselling and harvest is critical. A work interruption during either of these production phases could quickly mean the complete loss of a crop, the entire annual production and a possible shut-down of the processing facility for the full year or possibly permanently.

- For individual seed corn growers, losing this high-input and lucrative crop would cause a significant investment shortfall. Loss of seed corn also puts Ontario corn producers at risk since an alternative source of seed may not be available.

- Canadian seed corn companies estimate it costs an extra $3.00 - $4.00 per unit to produce seed corn in Ontario compared to U.S. producers. Given the multinational nature of the industry, the additional concern over a secure labour force could accelerate potential relocation decisions.

Dufferin County Federation of Agriculture

- Labour disputes and work disruptions would hinder the timeliness of planting, harvesting and delivery of crops.

Flowers Canada Ontario

- Strikes should not be permitted due to the perishability of farm products and the short time frames for planting and harvesting.

Landscape Ontario

- Since the horticultural industry involves the nurturing of living perishable plant material, the threat of work stoppages or strikes places too much power in the hands of labour.

Ontario Federation of Agriculture

- Farmers are concerned about the economic impact that work stoppages could have on their operations. The continuous nature of farm production processes means operations could be threatened easily and jobs lost in cases of work disruption due to disputes.

- Any legislation that would offer organizing rights to the farm workers must provide a means for settling disputes.

Ontario Fruit and Vegetable Growers' Association

- If labour has the "right to strike", implement a work slow down, or walk out, the producers will not get a second chance on many farms because they will not survive.

Ontario Hatcheries Association

- Strikes, and the corresponding threat of strikes, would have a devastating effect on Ontario Hatcheries due to the perishability of products and the economic requirements imposed by supply management. A work stoppage of any duration would result in 6 - 8 weeks of lost production and may cause a proportional shutdown further down the production chain including family farms.

- The destructive effect of a work stoppage would be compounded by the proposed elimination of the use of replacement workers.

Ontario Milk Marketing Board

- Due to the perishability of products and animal welfare strike action should be prohibited and an appeal mechanism created to settle disputes between farmers and farm workers.

Southern Georgian Bay District Fruit Growers

- A delay in harvesting could cause serious financial and product loss.

The Ontario Flue-Cured Tobacco Growers' Marketing Board

- All crops produced are non-human living organisms which require a great deal of uninterrupted attention and care. Due to the perishability of the product and short time frames for planting/harvesting, work stoppages or strikes could have a significant impact on the industry.

- In comparison to the production of other agricultural commodities, flue-cured tobacco is a high risk commodity with extremely high input costs. The loss of even the smallest portion of the crop could result in financial disaster to the producer.

- In addition, continuity of supply is essential to maintain and service domestic and international markets.

The Ontario Greenhouse Vegetable Producers Marketing Board

- If the employees wish to associate, they should have the right. However, a provision precluding strike action is required so that crop/harvests are not jeopardized.

- To add the threat of work stoppage to this sector would be placing a burden on agriculture that is unequalled by any industrial sector.

Thedford-Grand Bend Vegetable Growers' Association

- Due to the perishability of products, the horticultural industry can not live with strikes.

Thunder Bay Federation of Agriculture

- Issues concerning work stoppages must be addressed before agriculture should be brought under the Act.

Waterloo-Wellington-Dufferin Agricultural Employment Services

- Agriculture should be classified as a essential services to prevent work stoppages due to strike action.

Dependent Contractors

Canadian Mushroom Growers' Association

- It is inappropriate to simply apply this provision to the Agricultural Sector without assessing its implications.

Ontario Hatcheries Association

- The dependent contractors provision may have a disproportionate impact upon farmers because of the industry's frequent use of contract labour.

The Ontario Greenhouse Vegetable Producers Marketing Board

- Does not reflect the realities of the agricultural industries.

Supervisors

Canadian Mushroom Growers' Association

- In the agricultural setting it can be difficult to distinguish between the supervisors and labourers.

Ontario Hatcheries Association

- The line between employee and employer in agriculture is blurred. The complete or partial removal of the agricultural exemption could result in a disproportionate degree of unionization, truncated decision-making and the destruction of the informality of the employment relationship in the agricultural industry.

The Ontario Flue-Cured Tobacco Growers' Marketing Board

- The owner operator (producer) and family members often have multiple roles, they act as managers, supervisors, and labourers.

Access To Farm Premises for Organizing Purposes

Canadian Mushroom Growers' Association

- Every producer of biological products must retain the absolute authority to isolate and quarantine their facilities, livestock and susceptible crops.

Ontario Federation of Agriculture

- The replacement worker, access to property, and the powers of the Ontario Labour Relations Board needs to be reviewed in the farm context.

Ontario Hatcheries Association

- Access by trade union organizers to employer premises would be offensive to the privacy and private property rights of farm owners.

- Access could result in the possible violation of the industry's stringent sanitary and health regulations and endanger living organisms and potentially consumers.

The Ontario Greenhouse Vegetable Producers Marketing Board

- Every producer of greenhouse vegetables runs the risk of crop loss from individuals carrying pathogenic organisms into greenhouses.

Certification Procedures

Canadian Mushroom Growers' Association

- Any proposal to introduce collective bargaining to the agricultural sector should, as in the construction industry, recognize the difficulties associated with this particular industry.

Ontario Federation of Agriculture

- The highly seasonal and part-time nature of agricultural employment raises concerns over the nature of determining appropriate bargaining units in this sector.

Ontario Hatcheries Association

- The fluctuating workforce in agriculture makes determining appropriate bargaining units difficult and could potentially render an employer's seasonal workforce subject to the wishes of a smaller group.

The Ontario Flue-Cured Tobacco Growers' Marketing Board

- The tobacco labour force is highly seasonal - planting 10 to 14 days and harvesting 6 to 8 weeks, with these time frames dictated by mother nature.

The Ontario Greenhouse Vegetable Producers Marketing Board

- Due to the seasonality of the industry policies relating to part-time employees would be totally unacceptable for our industry. In addition, the part-time, seasonal, and full-time mix of employees does not lend itself to the bargaining unit process.

Related and Successor Employers

Canadian Mushroom Growers' Association

- Agricultural production, by its nature and history, tends not to be carried out with the same degree of isolation and independence found in the industrial sector. As a result, consideration should be given to the implications that this proposal could have on cooperatives.

- The issue of successor rights raises concerns over the possible impact that this provision may have on land values. Anything that could lower land values could increase the dangers of defaulting on loan payments.

Ontario Hatcheries Association

- This option may result in the Act capturing a broader class of agricultural labour then intended due to the Hatchery industry's participation in integrated poultry operations.

The Ontario Greenhouse Vegetable Producers Marketing Board

- Certification could result in the reduction of the value of the greenhouse and may increase the financial risks associated with operating in this industry.

- Related employer provisions are also not appropriate for the agricultural industry.

Picketing

Ontario Hatcheries Association

- Allowing picketing or "hot cargo" clauses could result in the interruption of the supply of pharmaceuticals to livestock and baby chicks causing death and significant loss to the hatchery. Picketing could result in an unwarranted intrusion into the farmer's privacy since farming is often carried out at the owner's family residence.

Collective Agreements

Ontario Hatcheries Association

- The terms and conditions found in collective agreements are ill-fitted to the agricultural industry and, in all likelihood, would destroy its unique qualities.

Proposals to Streamline Certification

Canadian Mushroom Growers' Association

- All of the proposed reforms in this area would collectively facilitate a union's initiative to organize farm workers, thereby imposing greater government regulation and administrative costs on the industry.

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Task Force on Agricultural Labour Relations: Report to the Minister of Labour.

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